Supreme Court, U.S.
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No. 942101 JUN 20 1995
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

CARLOS O. SALINAS,

Petitioner,

vs.

THE STATE OF TEXAS,

Respondent.

PETITION FOR WRIT OF CERTIORARI

to the
Texas Court of Appeals
For the Thirteenth District

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June 20, 1995

ISSUE PRESENTED

Because the prosecutors did not come forward with any explanation for the State's peremptory strikes of veniremen Flores and Torres, the State denied equal protection rights guaranteed under the Fourteenth Amendment to the U.S. Constitution. Those fundamental rights were again denied by the trial and appeals courts below, after both courts found the unrebutted facts established a prima facie case of purposeful discrimination. Nevertheless, the Texas Court of Appeals affirmed Petitioner's convictions of guilt.

LIST OF ALL PARTIES BELOW

The original parties before the Texas Court of Appeals for the Thirteenth District were the State of Texas and Petitioner Carlos Ochoa Salinas.

STATEMENT OF RELATED CASES AND PROCEEDINGS

This case has not previously come before this Court. Petitioner's undersigned counsel is not aware of any other related case pending before this Court.

IDENTITY OF DEFENSE COUNSEL BELOW

Petitioner Carlos Ochoa Salinas was represented at trial and on appeal by criminal defense attorney Joseph A. Connors III of McAllen, Texas.

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OPINION BELOW

The opinion of the court of appeals (Pet.App. 1-28) is reported. Salinas v. State, 888 S.W.2d 93 (Tex.App.—Corpus Christi 1994), pet. ref'd, ___S.W.2d ___ (Tex.Cr.App. 1995).

JURISDICTION

The Texas Court of Appeals for the thirteenth judicial district entered its judgments and opinion on October 13, 1994. That Court of Appeals overruled Petitioner's timely filed petitions for rehearing on November 17, 1994. On December 14, 1994, the Petitioner timely mailed for filing his petitions for discretionary review. The Texas Court of Criminal Appeals refused Petitioner's petitions for discretionary review on March 22, 1995. Within the 90 day period following March 22, 1995, Petitioner timely mailed this petition for writ of certiorari for filing by the Clerk of this Court. Supreme Court Rule 13.1. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

RELEVANT CONSTITUTIONAL PROVISIONS

Section 1 of the Fourteenth Amendment of the United States Constitution provides:

> Any persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

REASON FOR GRANTING REVIEW

The Texas Court of Appeals has decided a federal question in a way that conflicts with Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L.Ed.2d 69 (1986). See Supreme Court Rule 10.1(c).

Petitioner's conviction should be overturned because the State failed to sustain its burden of production, and therefore failed to rebut Petitioner's prima facie case of discrimination in use of the State's peremptory challenges during jury selection. Batson, 476

U.S. at 100, 106 S.Ct. at 1725. There the Court said:

> If the trial court decides the facts establish, prima facie, purposeful discrimination and the prosecutor does not come forward with a neutral explanation for his action, our precedents require that petitioner's conviction be reversed. E.g., Whitus v. Georgia, 385 U.S., at 549-550, 87 S.Ct., at 646-47; Hernandez v. Texas, 347 U.S., at 482, 74 S.Ct., at 672-673; Patton v. Mississippi, 332 U.S., at 469, 68 S.Ct., at 187. (Footnote omitted)

STATEMENT OF THE CASE

This Court has jurisdiction to review the judgments below on a writ of certiorari.

On September 29, 1992, the trial court denied Petitioner's motion to dismiss the array after the trial court conducted a Batson evidentiary hearing (Pet.App. 33-77), after Petitioner made a prima facie showing of the prosecutors' peremptorily striking many Hispanics (Pet.App. 8, 37-43, 47).

On October 7, 1994, the jury found Petitioner Carlos Salinas guilty on count 1 of murder and on count 3 of attempted murder in cause number CR-1044-90-A. The jury assessed

punishment at confinement in prison for forty-five years and twenty-five years respectively.

On October 13, 1994, the 13th Texas Court of Appeals affirmed the judgments of conviction and reversed the judgments as to the punishment and remanded the causes to the trial court (Pet.App. 1-28).

During appeal to the Texas Court of Appeals, Petitioner raised seven points of error. Only those contending racially biased jury selection are relevant here. In his points of error nos. 5A1, 5A2, 6A1 and 6A2, Petitioner complained the trial court reversibly erred (a) in not presuming race under the Batson case and the U.S. Constitution's Fourteenth Amendment's equal protection clause, as the basis of the State's strike on prospective jurors Eligio Flores and Daniel Torres, Jr., as to whom the State gave no explanation for its peremptory strikes and/or (b) in denying Petitioner's motion to dismiss the array and to call a new array under Article 35.261, Texas Code of

Criminal Procedure, for the State's racial excluding from the jury prospective jurors Eligio Flores and Daniel Torres, Jr., as to each of whom the State gave no explanation for its peremptory strike.

Rejecting Petitioner's contentions and reliance on Batson, the Texas Court of Appeals held that the prosecution's failure to provide explanations as to two venire-members did not amount to error. The Texas Court of Appeals said (footnote omitted) (Pet.App. 15-16):

> Our holding here is simply that despite the State's failure to explain its removal of veniremembers Flores and Torres, the trial court's conclusion that the State's use of its strikes was not race-based is supportable by other circumstances, i.e., the overwhelming number of Hispanics on the venire and the petit jury. In addition, the prosecutors gave race-neutral explanations for the strikes which appellant questioned.
>
> We recognize that the prosecutors did not comply with Wright's procedural requirements. In most cases such failure would constitute reversible error. Our holding is peculiar to the facts of this case. While it would have been better practice for the State to have explained all of its strikes, we find no reversible error in this case. Appellant's fifth and sixth points of error are overruled.

ARGUMENT

The trial court and the Texas Court of Appeals both reversibly erred in holding that the State had no burden herein to rebut Petitioner's prima facie Batson showing of discrimination in the State's unexplained use of two peremptory strikes.

Under Batson v. Kentucky, 476 U.S. 98 (1986), once the opponent of a peremptory challenge has made out a prima facie case of racial discrimination, the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation for the strike. If no explanation is offered by the State, the defendant's conviction must be reversed. Id., 476 U.S. at 100. However, if a race-neutral explanation is tendered, the trial court must then decide whether the opponent of the strike has proved purposeful discrimination. Hernandez v. New York, 500 U.S. 352, 358-359 (1991) (plurality opinion) id., at 375 (O'Connor, J., concurring in judgment).

The "burden of proof" within the Batson doctrine is three-fold in that it is a

shifting burden. Initially, the burden of proof lies with the opponent of the peremptory strike. Batson, supra, 476 U.S. at 98. In all cases alleging racial discrimination the complainant must first establish a prima facie case of racial discrimination. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 252-253, 101 S. Ct. 1089, 1093-94, 67 L.Ed.2d 207 (1981) [plaintiff's establishment of prima facie discrimination raises a presumption of unlawful discrimination].

"A presumption is not evidence in itself, however, a presumption operates to relieve the party in whose favor it works from going forward in argument or evidence. It also serves therefore the purposes of a prima facie case." Delo v. Lashley, 113 S.Ct. 1222, 1228 (1993). "All other presumptions are rebuttable by contravening evidence. However, unless and until contravening evidence is presented, a presumption gives rise to a mandatory deduction, i.e. the presumed fact must be assumed from

proof of the basic fact." (Footnote omitted) Charles E. Torcia, Wharton's Criminal Evidence, page 29 (1985); Texas Rules of Evidence Manual, Article III, (1991).

This presumption is rebuttable as the "burden of production" then shifts to the defendant to come forward with an explanation. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L.Ed.2d 668 (1973) [defendant may rebut this presumption by introducing evidence of legitimate and nondiscriminatory reasons for their actions]; Director, OWCP v. Greenwich Colleries, 114 S.Ct. 2251, 2259 (1994) [once the licensee establishes a prima facie case, the burden shifts to the government to rebut it]. "This rule of shifting persuasion is compatible with a rule placing the burden of persuasion on the applicant, because when the party with the burden of persuasion establishes a prima facie case supported by credible and credited evidence, it must either be rebutted or accepted as true." Id., 114 S.Ct. at 2259.

Silence, or the refusal or failure to offer a rebuttal did not amount either to raising an issue or to carrying the burden of production against a prima facie case.

Petitioner's convictions should be overturned because the State failed to sustain its burden of production, and therefore failed to rebut Petitioner's prima facie case of discrimination in jury selection. Batson, 476 U.S. at 100, 106 S.Ct. at 1725 ["If ... the prosecutor does not come forward with a neutral explanation for his action, our precedents require petitioner's conviction be reversed"].

The Texas Court of Appeals attempted to sidestep the State prosecutors' failure to offer an explanation with the fact that the first eighteen eligible panel members were Hispanic, and that twenty-four of the first twenty-five eligible members were also Hispanic (Pet.App. 14-16). Salinas v. State, supra, 888 S.W.2d at 99 (Tex.App.—Corpus Christi 1994) [the overwhelming number of Hispanics on the venire

and the petit jury]. In spite of Batson, the Texas Court of Appeals also emphasized the fact that the State's attorneys and the trial judge who ruled on the complaint were Hispanic (Pet.App. 14). Salinas, supra, 888 S.W.2d at 98.

The Texas Court of Appeals was unduly influenced by the ethnicity of the community in which the trial court was located. Both courts below disregarded the controlling law in this case: Batson requires the proponent of the strike to come forward with an explanation to rebut the opponent's prima facie showing of discriminatory intent.

The Texas Court of Appeals, in effect, overruled Batson by finding no error allowing the State to refuse to offer any evidence for striking veniremen Torres and Flores. In failing to sustain its burden of production, the State conceded or accepted Petitioner's prima facie showing of discriminatory intent.

Not only did the Texas Court of Appeals err in misapplying Batson and its progeny, that Court of Appeals also erred in finding no federal Constitutional equal protection violation.

In Batson challenges as in all equal protection claims, the defendant must show that the prosecutor deliberately used the State's peremptory challenges for the purpose of excluding a minority person from the jury. Hernandez v. New York, 500 U.S. ___, 111 S.Ct. 1859, 1886, 114 L.Ed.2d 395 (1991).

The goal of Batson was not only to guard the equal protection rights of individual defendants from racial discrimination in the selection of jurors, but also to secure the rights of the prospective jurors and the community at large from racial discrimination in the selection of juries. Powers v. Ohio, 499 U.S. 400, 111 S.Ct. 1364, 1370-1374, 113 L.Ed.2d 411 (1991); Holland v. Illinois, 493 U.S. 474, 110 S.Ct. 803, 107 L.Ed.2d 905 (1990).

A criminal defendant may object to the State's racially discriminatory exclusions of prospective jurors through the exercise of peremptory challenges whether or not the defendant and the excluded venireperson share the same race. Powers, 499 U.S. at ___, 111 S.Ct. at 1373; Mead v. State, 819 S.W.2d 869 (Tex.Cr.App. 1991). "Batson represents a special rule of relevance, a statement about what this Nation stands for, rather than a statement of fact." Brown v. North Carolina, 479 U.S. 940, 941-942, 107 S.Ct. 423, 424, 93 L.Ed.2d 373 (1986) [O'Connor, J., concurring in opinion denying certiorari.]. Batson is a commitment by the courts to eradicate any vestige of racial discrimination in the administration of justice. Id.

Additionally, the Texas Court of Appeals erred in weighing federal Constitutional rights. Contrary to the ruling in Alvarado v. U.S., 497 U.S. 543, 110 S.Ct. 2995, 111 L.Ed.2d 439 (1990), the Texas Court of Appeals in effect

held that since for Petitioner the Sixth Amendment's requirement of a fair cross section had been met, there was no need to consider under the Fourteenth Amendment's equal protection clause, Petitioner's claim that the State had not met its burden of persuasion as required in Batson v. Kentucky, 476 U.S. 79 (1986).

Petitioner showed himself to be a member of an identifiable racial or ethnic group. "... Mexican-Americans are a clearly identifiable class." Castañeda v. Partida, 430 U.S. 482, 496, 97 S.Ct. 1272, 1280, 51 L.Ed.2d 498 (1977) [state did not rebut criminal defendant's prima facie case showing discrimination against Mexican-Americans in the grand jury selection in Hidalgo County, Texas, so there was a fatal denial of equal protection of the law in the grand jury selection process in Partida's case].

Hidalgo County, Texas, is the situs for the above Partida case as well as the county where Petitioner Salinas was jury tried after

unsuccessfully asserting each Hispanic and Anglo venireperson's right to the equal opportunity to serve on a jury free from being peremptorily struck by the State's racially based discriminatory motives. Powers v. Ohio, 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991); Georgia v. McCollum, 505 U.S. ___, 112 S.Ct. 2348, 120 L.Ed.2d 33 (1992).

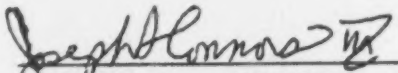
Petitioner's prima facie showing of the State's discrimination shifted the burden of persuasion onto the State to prove that the prosecutors did not strike based upon race. Batson, id., 476 U.S. at 1723-25. The State failed to explain its motivation for striking veniremen Eligio Flores and Daniel Torres, Jr. Therefore, both Petitioner's convictions should be overturned based on his Constitutional "right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria." Batson, id., 476 U.S. at 85-85, 106 S.Ct. at 1717.

CONCLUSION

For all of the forgoing reasons, Petitioner respectfully urges this Court to grant this writ of certiorari, and remand these cases to the Texas Court of Appeals with instructions to reverse Petitioner's judgments of conviction as Constitutionally invalid.

DATED: June 20, 1995.

Respectfully submitted by,
Petitioner's Attorney,



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APPENDIX TO

PETITION FOR WRIT OF CERTIORARI

to the
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ATTORNEY FOR PETITIONER

June 20, 1995

TD2:SALINAS.APP

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NUMBERS 13-93-058-CR & 13-93-059-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI

==========

CARLOS SALINAS, Appellant,

v.

THE STATE OF TEXAS, Appellee.

==========

On appeal from the 92nd District Court
of Hidalgo County, Texas.

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O P I N I O N

Before Chief Justice Seerden,
Justices Kennedy & Dorsey

Opinion by Justice Kennedy

Carlos Salinas was charged in a three-count indictment with the murder of Jesus Lopez, the attempted murder of Firmato Rodriguez, and the aggravated assault of Firmato Rodriguez. The jury found appellant guilty of murder and aggravated assault, found enhancement paragraphs true, and assessed punishment at confinement in

prison for forty-five years and twenty-five years respectively.

Appellant raises seven points of error, contending that jury selection was racially biased, that the prosecution knowingly used perjured testimony, that the court should have instructed the jury on lesser included offenses, that the evidence is insufficient to support the verdict, and that the enhancement paragraphs were not properly before the jury. Some of these points were raised in only one of the cases; we will note when that occurs. We find error in the punishment phase only and reverse and remand the causes to the trial court. See Tex.Code Crim.Proc.Ann. Art. 44.29(b) (Vernon Supp. 1994).

Appellant contends in points five and six that the trial court erred by not finding that the State used its peremptory strikes against Hispanic jurors in a racially discriminatory manner. By point five, appellant contends that the court erred in denying his motion to dismiss

the jury array under Tex. Code Crim. Proc. Ann. art. 35.261 (Vernon 1989). By point six, appellant contends that the court erred in not presuming race was the basis for the State's strikes as the State failed to explain some of its strikes and gave pretextual explanations for some of its other strikes. See U.S. Const. Amend. XIV; *Batson v. Kentucky*, 476 U.S. 79 (1986).

After voir dire questioning, appellant raised a *Batson* complaint about the State's use of its strikes. Outside the venire panel's presence, Judge Homer Salinas held a hearing on appellant's contention. Appellant stated that he was Mexican-American. After establishing on the record which members the State peremptorily removed, appellant's counsel stated that he believed he had made a *prima facie* case based on the State "striking that many Hispanic surnamed

jurors."[1] Judge Salinas then stated, "The State has got to prove that they did not strike based upon race alone." Thereafter, defense counsel questioned the prosecutors, Luis Martinez and Jaime Palacios, about their strikes. Appellant inquired about some, but not all, of the strikes. The State offered reasons for those veniremembers appellant inquired about but did not offer reasons for exercising its strikes on two veniremembers (Flores and Torres) who were not subjects of appellant's inquiry. Prosecutor Martinez stated that all the remaining jurors were Hispanic and being in deep South Texas where the vast majority of veniremembers are Hispanic, "[I]t's almost a

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[1] The State used nine of ten strikes on persons with Hispanic surnames. The State's other strike was used on veniremember Judith Lawson. Prosecutor Luis Martinez offered a specific race-neutral explanation for that strike because he thought Lawson "might be Hispanic." It thus appears that the prosecutor used all of his strikes on members with Hispanic surnames or those he thought "might be Hispanic."

near impossibility not to strike ten Hispanics."[2] Prosecutors Martinez and Palacios stated that none of the strikes were based on race. Judge Salinas then directed the defense to present evidence of relevant facts to show discriminatory motive. Appellant presented no additional evidence but argued that the State's reasons for striking veniremembers Vega and Borrego were incredible. At the end of the hearing, Judge Salinas stated that of the original venire of forty members, thirty-four members were Hispanic and thirty-two had identifiable Spanish surnames. Judge Salinas found that the State did not create error in exercising its strikes. Judge Salinas then impaneled jurors with the last names Rendon, Hernandez, Valez, Gonzalez, Ramirez, Gonzalez, Aguire, Gonzalez, Valle, Rangel,

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[2] The initial jury list apparently included all Hispanics. At the *Batson* hearing it was discovered that the Clerk had inadvertently passed over juror Carol Skloss. The corrected jury list included Skloss and she served on appellant's jury. Thus, the final jury included eleven Hispanic surnamed jurors and Skloss.

Skloss, and Chapa, with an alternate named Mulkey.[3]

Under both *Batson* and Texas law the defendant has the burden of asserting a *prima facie* case of racial motivation for the strikes. *Id.* at 106; Tex. Code Crim.Proc. Ann. art. 35.261 (Vernon 1989). Once the defendant establishes a *prima facie* case, the State must articulate race-neutral explanations for the questioned strikes; the defendant may then

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[3] The venire panel included: 1. Leonard Munoz, 2. Sylvester Zamora, 3. Yolanda Garcia, 4. Jose Rendon, 5. Juan Hernandez, 6. Eligio Flores, 7. Beatrice Valdez, 8. Idalia Gonzalez, 9. Ana Martinez, 10. Ruben Gonzalez, 11. Noeliz Gonzalez, 12. Peter Brooke, 13. Hermelinda Aguirre, 14. Maria Romo, 15. Judith Lawson, 16. Irma Vair, 17. Ricardo De La Vina, 18. Reynaldo Vega, 19. Daniel Torres, 20. Fidel Borrego, 21. Paul Taube, 22. Daniel Ramirez, 23. Gloria Gonzalez, 24. Pablo Valle, 25. Maria Martinez, 26. Maria Garcia, 27. Jesus Rangel, 28. Roberto De La Rosa, 29. Pablo Reyes, 30. Robert De La Rosa, 29. Pablo Reyes, 30. Robert Murden, 31. Carol Skloss, 32. Roberto Trevino, 33. Virginia Davis, 34. Antonio Garcia, 35. Manuel Chapa, 36. Arthur Mulkey, 37. Jimmy Jones, 38. Pablo Guevara, 39. Maria Flores, 40. Margarita Escamilla.

Veniremembers 3, 12, 26, 29, 34, and 37 were removed for cause. The State used peremptory strikes on 1, 6, 11, 14, 15, 17, 18, 19, 20, and 22.

rebut these explanations. The defendant carries the burden of persuasion under both the federal case law and the state statute. *Batson*, 476 U.S. at 106; Tex. Code Crim. Proc. Ann. art. 35.261.

The State asserts that appellant never made a *prima facie* case. Appellant asserts that the establishment of a *prima facie* case is a moot issue because the State did not object to offering reasons for its strikes and because the trial court ruled on the ultimate question of intentional discrimination.

In *Chambers v. State*, 886 S.W.2d 9, 23 (Tex.Crim.App. 1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 1871 (1994), the Court of Criminal Appeals held that the State cannot claim the lack of a *prima facie* case if it did not object at trial when asked to offer explanations for its strikes. *See Hill v. State*, 827 S.W.2d 860, 862-65 (Tex.Crim.App. 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 297 (1992) (issue of the existence of the *prima*

facie case moot where prosecutor offers reasons without prompting from the court). In the case at bar, the defense complained about the State's strikes. The trial court stated that the State had to explain its strikes, and the State responded to appellant's questions without objecting. We cannot agree that the trial court never determined that a *prima facie* case of racial discrimination was shown. The trial court's ruling that the State had to prove "they did not strike on race alone" indicates to us that the trial court found a *prima facie* case. Even if the court did not, the State did not object to giving explanations. The *prima facie* issue is moot. *Chambers v. State*, 866 S.W.2d at 23.

Appellant argues that reversal is required because once the State chose to give reasons (and thereby moot the *prima facie* issue), it failed to give any reasons for striking jurors Flores and Torres and gave pretextual reasons for striking veniremembers Munoz, Lawson, Vega,

Borrego, and Ramirez. We first address the five veniremembers for which the State offered explanations.

The State removed (1) Munoz because he wavered in some of his answers; (2) Lawson because she had spent a lot time in Panama and might not understand the legal principles at issue; (3) Vega because the prosecutor could not get much information from him; (4) Borrego because he was from the same general area where the offense was committed and one of the prosecutors thought he had a business in the vicinity of Sullivan City; and (5) Ramirez because he was a janitor at P.S.J.A. and the State had recently prosecuted a P.S.J.A. janitor for murder.

Our review of the record supports the trial court's finding that the State did not strike these veniremembers on racial grounds. Munoz gave conflicting answers to the same question. Such conduct could be interpreted as "wavering." Juror Lawson stated she had lived in Panama, and

she testified that she would have to listen to the evidence and that it would be difficult for her to decide. With regard to Vega's occupation, the record shows neither party offered the juror information cards into evidence and the State did not question Vega about his occupation.[4] While, the voir dire questioning does not reveal that Borrego had a business near the site of the offense, the record shows that one of the two prosecutors thought Borrego did. The record shows that Ramirez was a custodian at P.S.J.A. Ramirez was not questioned about his views or knowledge of the State's prosecution of another P.S.J.A. custodian.

Under *Batson*, the intent to discriminate is a "pure issue of fact, subject to review under a deferential standard." *Vargas v. State*, 838

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[4] Vega's juror's card is contained in the appellant transcript. Although not introduced into evidence, the State referred to it at the *Batson* hearing. We will consider it on appeal. *See Cornish v. State*, 848 S.W.2d 144, 145 (Tex. Crim App. 1993).

S.W.2d 552, 554 (Tex.Crim.App. 1992) (citing *Hernandez v. New York* ___ U.S. ___, 111 S.Ct. 1859, 1869 (1991)). On appeal, the standard of review is whether the trial judge's decision was supported by the record so that it was not clearly erroneous. *Id.* For us to conclude that the court's decision was clearly erroneous, we must be left with a "definite and firm conviction that a mistake has been committed." *Id.*

The explanations given for the above five veniremembers were race-neutral. Except with respect to Borrego, the validity of the prosecutor's reasons are inferable from the voir dire record or the juror information cards. With respect to Borrego, prosecutor Martinez stated that he based his strike on information from prosecutor Palacios that Borrego had a business in the same general location as the offense and feared he might have some general information that would affect his opinion. Undisputed statements by the attorneys in

support of their positions in a *Batson* hearing constitute "valid proof." *Moss v. State*, 877 S.W.2d 895, 899 (Tex.App.—Waco 1994, no pet.) (citing *Emerson v. State*, 820 S.W.2d 802, 804 (Tex. Crim. App. 1991)). The prosecutor's ability to understand a juror card, his knowledge of a veniremembers business location, and the State's prior prosecutions involve matters which relate in large part to the credibility of the prosecutor. Even if the prosecutor was mistaken in some of these beliefs, the judge could still conclude that the strike was race-neutral because the prosecutor based his preemptory strike on an honest belief. *Jack v. State*, 867 S.W.2d 942, 947 (Tex. App.—Beaumont 1993, no pet.). The trial court may accept the prosecutor's race-neutral explanations at face value. *Satterwhite v. State*, 858 S.W.2d 412, 424 (Tex. Crim. App.1993). Absent some other evidence which rebuts the State's race-neutral explanation, we will not disturb the trial court's finding

that the State's explanation is legitimate. *Moss*, 877 S.W.2d at 899. Applying the "clear error standard of review," we find no error in the trial court's rulings.

We now turn to the two veniremembers which the State did not offer any reasons for striking. In *Wright v. State*, 832 S.W.2d 601, 604-05 (Tex.Crim.App. 1992), the Court of Criminal Appeals reaffirmed that once the defendant establishes a *prima facie* showing of purposeful discrimination, the State must come forward with race-neutral explanations. *Wright* further held that the lack of an explanation, even if based on the State's oversight, presented a failure in the State's burden and constituted reversible error. *Wright*, 832 S.W.2d at 603-05.

While we are reluctant to distinguish *Wright*, we cannot find reversible error in this record. In *Wright*, the State removed all the black veniremembers remaining on the panel, leaving an all-white panel. The present case is

factually distinguishable. In the case at bar, thirty-four members of the original panel were Hispanic. Eleven of the twelve impaneled jurors had Hispanic surnames. Moreover, discounting members removed for cause, the first eighteen eligible members were Hispanic, and twenty-four of the first twenty-five eligible members were Hispanic. The State's attorneys and the trial judge who ruled on appellant's complaint were Hispanic.

Batson was designed to protect individual defendants from discrimination in the selection of jurors, to protect the excluded jurors, and to protect the community at large. *Powers v. Ohio*, 111 S.Ct. 1364, 1368 (1991). The facts of this case do not suggest that rights of the defendant, the excluded jurors or the community at large were violated.

We recognize the apparent conflict between our above holding (*prima facie* case of discrimination exists because the State failed to object to giving race-neutral reasons for its

strikes) and this holding (record does not demonstrate purposeful discrimination). We do not believe an actual conflict exists, however. The above holding is based on *Chambers* and resolves appellant's complaints within the context of *Batson* and its progeny. Our holding here is simply that despite the State's failure to explain its removal of veniremembers Flores and Torres, the trial court's conclusion that the State's use of its strikes was not race-based is supportable based on other circumstances, i.e., the overwhelming number of Hispanics on the venire and the petit jury. In addition, the prosecutors gave race-neutral explanations for the strikes which appellant questioned.

We recognize that the prosecutors did not comply with *Wright's* procedural requirements. In most cases, such failure would constitute reversible error. Our holding is peculiar to the facts of this case. While it would have been better practice for the State to have

explained all of its strikes, we find no reversible error in this case.[5] Appellant's fifth and sixth points of error are overruled.

By point of error seven, Salinas contends that we must reverse the convictions because the State knowingly used perjured testimony. He bases this contention on an affidavit of one of the witnesses which was filed separate from any motion more than two months after trial and almost two months after the judgment was signed. Despite the dubious preservation of this issue, we address its lack of merit. The witness states in her affidavit that an investigator pressured her to give a statement asserting that she saw critical elements of the crime. She states that the investigator pressured her to testify at trial. She states that she went over the statement before trial and testified based

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[5] We are aware of Batiste v. State, No. 1148-92 (Tex. Crim. App. September 14, 1994) (not yet reported), in which the Court of Criminal appeals presumed that Batson error is not amenable to a harm analysis. The composition of the Batiste jury factually distinguishes that case from this one.

on that statement. She avers that she never saw many of the events that she had said she saw in her statement.

We find that the statement does not show that the prosecution knew that her statement was false or her testimony perjured. Salinas contends that the State was charged with knowledge through the purportedly pressuring investigator. The affidavit states only that the investigator pressured her to give a statement and to testify and that she lied in her statement and at trial. There is no evidence that the State knowingly used perjured testimony to obtain the conviction. We overrule point seven.

Salinas contends by points of error two and three that the trial court erred by failing to instruct the jury on lesser-included offenses within the aggravated assault.[6] In determining whether a jury must be instructed on a

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[6] These points of error apply only to case No. 13-93-059-CR.

lesser-included offense, a two-step analysis must be applied. *Royster v. State*, 622 S.W.2d 442, 446 (Tex. Crim. App. 1981). The first prong of the test requires that the offense requested to be charged is a lesser included offense of the offense charged. *Ross v. State*, 861 S.W.2d 870, 874 (Tex.Crim.App. 1992); *Royster*, 622 S.W.2d at 446. Second, there must be some evidence in the record showing that if the defendant is guilty, he is only guilty of the lesser offense. *Ross*, 861 S.W.2d at 874 (Tex.Crim. App. 1992); *Royster*, 622 S.W.2d at 446.

The indictment for aggravated assault alleged that appellant intentionally and knowingly threatened Firmato Rodriguez with imminent bodily injury by the use of a deadly weapon, to wit: a firearm that in the manner of its use and intended use was capable of causing death and serious bodily injury. Appellant requested the trial court to instruct the jury on the offense of terroristic threat. A person

commits this offense "if he threatens to commit any offense involving violence to any person or property with intent to: (2) place any person in fear of imminent serious bodily injury." Tex. Penal Code Ann. §22.07(a)(2) (Vernon 1989). Appellant also requested a charge on the offense of reckless conduct. A person commits the offense of reckless conduct if he recklessly engages in conduct that places another in imminent danger of serious bodily injury. Tex. Penal Code Ann. §22.05(a) (Vernon 1989).

The facts show that appellant shot Jesus Lopez outside the Oasis nightclub. Firmato Rodriguez, who worked as a security officer at the club, was inside the club at the time. Some ladies came inside and told Rodriguez someone was being shot. Rodriguez headed outside, with Norma Hernandez right behind him. After they exited the door, Rodriguez told Hernandez to step back, that he would handle the situation. As Rodriguez progressed forward, appellant, pointing a pistol toward Rodriguez, screamed,

"You better go back inside, mother-fucker, or I'll shoot." Rodriguez, fearing for his life, ducked under an adjacent van. Appellant fired two shots. Rodriguez stayed under the van until appellant left. Hernandez testified that appellant could have been pointing the gun at her, as she was in the same direction as Rodriguez. An investigating police officer testified that he found a chip, which could have been caused by a bullet, in a block by the club's entrance.

Appellant contends a reckless conduct charge was required, citing *Mullins v. State*, 767 S.W.2d 166, 169-170 (Tex.App.—Houston [1st Dist.] 1988, no pet.) because there was some evidence from which the jury could find that he was guilty only of reckless conduct. Appellant contends that the jury, by selectively considering the testimony, could have found that he was not threatening imminent bodily injury to Rodriguez but was merely recklessly firing a warning shot intending to hit the club's wall

after Rodriguez was already under the van. Under this scenario, appellant asserts he would have been guilty only of reckless conduct. We disagree.

In *Mullins*, the defendant was involved in an argument with the complainant. As the complainant approached the defendant from a distance, the defendant told the complainant that if he came any further he would "blow his ass away." Undeterred, the complainant continued forward. The defendant fired one shot, hitting a vacant apartment near the complainant. The Court of Appeals held that despite the defendant's failure to testify, there was some evidence that the defendant was merely recklessly firing a warning shot intended to strike a vacant apartment. The Court held that the trial court should have included an instruction on the lesser included offense of reckless conduct.

Mullins appears to be indistinguishable, and, if so, we find it wrongly decided. In the

present case and in *Mullins*, there is no evidence that the discharge of the weapon, i.e., the actus reus, was not intentional. To be entitled to a reckless conduct charge, there would have to be evidence that the defendant was only reckless with respect to the circumstances surrounding his conduct or the result of his conduct. In both *Mullins* and the present case, the evidence does not show that the actors intended to do anything other than threaten the complainants.[7] The evidence fails to show that appellant, if guilty, was guilty only of the lesser offense of reckless conduct.

Likewise, we do not find that the evidence shows that appellant, if guilty, is guilty only of making a terroristic threat. Appellant asserts that there is some evidence that

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[7] In *Mullins*, the Houston Court concludes that the jury could have inferred that the defendant fired a warning shot intended to hit a vacant apartment and so was only reckless. We fail to see the logic of this holding. Inherently, if the defendant fired the shot as a warning, he intended to threaten. Thus, the defendant was not guilty only of the lesser offense.

appellant only made an oral threat because there is some evidence that Cantu fired the shots at Rodriguez. Appellant does not refer us to any place in the record where the evidence shows that Cantu fired the shots. The State responds that there is no evidence that Cantu fired the gun, and we can find no such evidence. As such, appellant's argument is without factual support and thus without merit. There is no evidence that appellant only threatened to commit a violent offense. The evidence shows that appellant committed an offense. Appellant's second and third points are overruled.

By point four, appellant contends the evidence is insufficient to establish the firearm, in its manner of use and intended use, was capable of causing death or serious bodily injury because the weapon was only used to fire warning shots. The evidence shows that appellant shot one man. When security guard Rodriguez approached, appellant warned him to go back inside or be shot. Appellant then fired in

the direction of the guard. We find this evidence sufficient to establish that the firearm was capable of causing death or serious bodily injury. The evidence is sufficient to sustain the conviction. Point four is overruled.

By point one, Salinas contends that the court erred by sentencing him on the enhancement issue without reading the enhancement allegations to him or to the jury and without his entering a plea to the enhancement allegations. Enhancement paragraphs must be read to the jury. Tex. Code Crim. Proc. Ann. §36.01(a)(1) (Vernon Supp. 1994); *Warren v. State*, 693 S.W.2d 414, 415 (Tex.Crim.App. 1985). We must presume that the defendant was arraigned and that he pled to the charging instrument "unless such matters were made an issue in the court below, or it otherwise affirmatively appears to the contrary from the record." Tex.R.App.P. 80(b). Silence is not an affirmative showing of the failure to read or

plead. See *Hazelwood v. State*, 838 S.W.2d 647, 651 (Tex.App.—Corpus Christi 1992, no pet.).

Though the jury charge on punishment recites that the defendant pled "not true" to the enhancement paragraphs, there is no indication that any reading or plea occurred. The defense mentioned this failure for the first time in his jury argument. After the jury was released, the following exchange occurred:

> DEFENSE COUNSEL: Judge, If I may as to the sentence I do have an objection to you passing sentence at this time because it is the defense contention that those verdicts, since they use verdict form one and found the two prior allegations, enhancements true that that was an improper conduct by the jury since those issues were never raised in front of the jury because they were never enhancement paragraphs. In count one, Paragraphs 3 and 4 of the indictment were never read to the jury and my client never answered true or not true. So therefore the sentence is void Your Honor. But other than that small legal problem I have no other reasons [why judgment and sentence should not be pronounced].
>
> THE COURT: Yeah. I'm not saying that it's not a small--that it is a small legal problem, but we will proceed with sentence at this time counselor. Of course, I will allow you to make any proper motions at a future date if you so wish like Monday or tomorrow.

The court then proceeded to sentence Salinas.

The proper motions to which the court referred were likely a motion for new trial, a bill of exception, or a motion to arrest judgment. The Court of Criminal Appeals cited these as ways in which to preserve error in cases in which the indictment was not read and defendant has not pled. *Warren*, 693 S.W.2d at 416. That court interpreted the statutory predecessor of appellate rule 80(b) broadly. *Id.* That court held that an appellant preserved error by bringing a similar misstep to the court's attention as follows:

> Your Honor, it's come to my knowledge that the enhancement paragraphs were not read to the defendant prior to proceeding on the punishment phase. And for the record we would object to that and ask for a mistrial.

Id. Though this objection occurred after the jury was dismissed and was not in the form of any of the three motions listed above as sufficient to preserve error, the court held that the objection and motion presented the issue to the court and had the same effect as a

motion for new trial. *Id.* Salinas's attorney's statement quoted above is the equivalent of the statement in *Warren*. His statement distinguishes this case from another of our cases in which the defense failed to call the trial court's attention to the failure to read the indictment. Compare with *Hazelwood*, 838 S.W.2d at 651. Though the statement here is far from the ideal procedure, it sufficiently raised the issue before the trial court. Compare with *Warren*, 693 S.W.2d at 416.[8] We sustain point one.

We reverse the judgments as to the

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[8] The Houston court advocated the use of a harm analysis in addition to the *Warren* test. *Lara v. State*, 740 S.W.2d 823, 828 (Tex. App.—Houston [1st Dist.] 1987, pet. ref'd), *cert. denied*, 493 U.S. 827 (1989). The court in *Lara* found that because the defendant was arraigned outside the presence of the jury and because the jury was informed of the charges by the reading of the indictment and the prosecutor's voir dire statement, the failure to read the indictment and enter a plea was harmless. *Lara*, 740 S.W.2d at 828. Our case has no similar showing of arraignment outside the presence of the jury nor of any reading of the indictment to the jury. The harms mentioned and avoided in *Lara* are apparent here.

punishment and remand the causes to the trial court.

NOAH KENNEDY
Justice

Opinion ordered published.
Tex. R. App. P. 90

Opinion delivered and filed this
the 13th day of October, 1994.

COURT OF APPEALS
Thirteenth Judicial District
Corpus Christi, Texas

Below is the JUDGMENT in the numbered cause set out herein to be Filed and Entered in the Minutes of the Court of Appeals, Thirteenth Judicial District of Texas, at Corpus Christi, as of the 13th day of October, 1994. If this Judgment does not conform to the opinion handed down by the Court in this cause, any party may file a motion for Correction of Judgment with the Clerk of this Court.

CAUSE NO. 13-93-058-CR
(Tr.Ct.No. CR-1044-90-A, Count One)

CARLOS SALINAS, Appellant,

v.

THE STATE OF TEXAS, Appellee

on appeal to this Court from Hidalgo County, Texas.

* * * * * * * * *

J U D G M E N T

On appeal from the 92nd District Court of Hidalgo County, Texas, from a judgment signed October 28, 1992. Opinion by Justice Noah Kennedy. Opinion ordered published. Tex. R. App. P. 90.

THIS CAUSE was submitted to the Court on January 26, 1994, on oral argument, the record, and briefs. These having been examined and fully considered, it is the opinion of the Court that there was some error in the judgment of the court below, and said judgment is hereby REVERSED AND REMANDED.

It is further ordered that this decision be certified below for observance.

* * * * * * * * *

CATHY WILBORN, CLERK

COURT OF APPEALS
Thirteenth Judicial District
Corpus Christi, Texas

Below is the JUDGMENT in the numbered cause set out herein to be Filed and Entered in the Minutes of the Court of Appeals, Thirteenth Judicial District of Texas, at Corpus Christi, as of the 13th day of October, 1994. If this Judgment does not conform to the opinion handed down by the Court in this cause, any party may file a motion for Correction of Judgment with the Clerk of this Court.

CAUSE NO. 13-93-059-CR
(Tr.Ct.No. CR-1044-90-A, Count Three)

CARLOS SALINAS, Appellant

v.

THE STATE OF TEXAS, Appellee

on appeal to this Court from Hidalgo County, Texas.

* * * * * * * * *

JUDGMENT

On appeal form the 92nd District Court of Hidalgo County, Texas, from a judgment signed October 28, 1992. Opinion by Justice Noah Kennedy. Opinion ordered published. Tex. R. App. P. 90.

THIS CAUSE was submitted to the Court on January 26, 1994, on oral argument, the record, and briefs. These having been examined and fully considered, it is the opinion of the Court that there was some error in the judgment of the court below, and said judgment is hereby REVERSED AND REMANDED.

It is further ordered that this decision be certified below for observance.

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CATHY WILBORN, CLERK

APPELLATE COURT NO. _____

IN THE 13TH COURT OF APPEALS
OF THE STATE OF TEXAS
AT CORPUS CHRISTI

CAUSE NO. CR-1044-90-A

CARLOS SALINAS, Appellant

VS.

THE STATE OF TEXAS, Appellee

APPEAL FROM THE 92ND DISTRICT COURT
HIDALGO COUNTY, TEXAS

Judge Homer Salinas Presiding

STATEMENT OF FACTS

VOIR DIRE EXAMINATION PROCEEDINGS
September 28, 29, 1992

VOLUME III
OF
XII VOLUMES

JESSIE C. SALAZAR, C.S.R.-R.P.R.
Official Court Reporter
92nd District Court
Hidalgo County, Texas

SEPTEMBER 29, 1992
AFTERNOON SESSION

THE COURT: You may be seated. Do you have the list Mr. Luna?

THE CLERK: Yes, sir, I do.

THE COURT: Ladies and gentlemen of the jury panel, as your names are called out, please come forward and take your place on the jury bench.

MR. CONNORS: Pursuant to Article 35.261, I ask that this array be dismissed and call a new array.

THE COURT: Pardon me just a minute. I couldn't hear you, sir.

MR. CONNORS: I'm losing my voice. Under Article 35.261 of our Code of Criminal Procedures, I ask you to dismiss this array and call another array.

THE COURT: 35 what? 261?

MR. CONNORS: Yes, judge. I believe the rules require I have to make that motion before you empanel.

THE COURT: Let's everybody, my people

come into my chambers at this time. Bring the defendant into my chambers, court reporter.

(WHEREUPON, the following hearing was held inside the Court's chambers.)

THE COURT: The record will reflect that in cause number CR-1044-90-A, State of Texas versus Carlos Salinas, the voir dire was concluded this morning at approximately, and I'm just guessing 11:45-50 close to 12:00 o'clock.

The attorneys made their strikes during the lunch hour. The strikes were submitted to the District Clerk attending to the -- to this particular jury and that jury list was prepared, that at 1:30 the court was ready to proceed in seating the jury, that at this time, after the Clerk had prepared the -- the list, and the strikes had been made the defense counsel is calling the court's attention to Article 35.261, preemptory challenges based on race prohibited. And he has

requested, as I understand, correct me Mr. Connors, you've requested the court to dismiss the array?

MR. CONNORS: Yes, Your Honor.

THE COURT: Is that correct?

MR. CONNORS: That's the motion but I think before you did that you ought to have to put some evidence.

THE COURT: Yes, sir.

MR. CONNORS: Are we ready?

THE COURT: We're read to proceed. The record will reflect that we're in the court's chambers simply because -- the defendant is present, as is the defense attorney and the State's attorney -- the courtroom is packed with the jury panel. Is this procedure satisfactory to you Mr. Connors?

MR. CONNORS: Yes, judge.

THE COURT: Very well. You may proceed.

MR. CONNORS: I need to swear in my

client very briefly, Your Honor.

THE COURT: Raise your right hand. What is your name, please?

PROSPECTIVE WITNESS: Carlos Salinas.

(Witness sworn.)

THE COURT: And this testimony, the Court is going to limit, no cross-examination on anything. This is strictly for purposes of this motion, counselor.

MR. CONNORS: Yes, judge.

CARLOS OCHOA SALINAS,

having been put on as a witness by his attorney, after having first been duly sworn upon his oath to tell the truth, the whole truth and nothing but the truth, testified upon his oath as follows, to wit:

EXAMINATION

BY MR. CONNORS:

Q State your name.

A Carlos Ochoa Salinas.

Q And are you of Mexican-American ancestory?

A Yes, sir.

MR. CONNORS: All right, Your Honor. I've just received a copy of the -- I don't know if you've seen it -- a list of the jurors.

THE COURT: I haven't looked at it yet.

MR. CONNORS: That are to serve and I compared it with the strikes Mr. Salinas and I made and I noticed that I believe the State struck one person who was Anglo, Juror Number 31, Ms. Skloss and I count eight other strikes of Hispanic jurors. I can't figure out where their ninth and tenth juror went. But I guess we need the jury's list of the state and we could see real easily who they struck. It should be in your file if I can come around here and try to find it judge.

THE BAILIFF: I have it here.

MR. CONNORS: It's in your hand.

THE COURT: Is that of the state?

MR. CONNORS: That's the State.

THE BAILIFF: They're both there, judge.

THE COURT: Well figure it out.

MR. CONNORS: Thank you, judge. For this purpose of this hearing may I have marked as Defense Exhibit Number 1, the State's list Your Honor.

THE COURT: Yes, sir.

MR. CONNORS: And I'd like to mark as Defense Exhibit 2, the defense list.

THE COURT: Very well.

MR. CONNORS: Each are two pages documents. I'd like to call Mr. Martinez to the stand.

THE COURT: Very well.

(Witness sworn.)

LUIS MARTINEZ,

a witness called, after having been first sworn upon his oath to tell the truth, the

whole truth, and nothing but the truth, testified upon his oath as follows to wit:

EXAMINATION

BY MR. CONNORS:

Q Mr. Martinez, I'm showing you Defense Exhibit 1, a two page instrument, Defense Exhibit 1. Are you familiar with that?

A Yes, sir, I am.

Q That consists of the strikes that the state made in the case of Carlos Salinas on trial now?

A Yes, sir, it is.

Q Okay. And the first strike of the State was Leonardo Munoz; is that right?

A That's correct.

Q Number two was Eligio Flores?

A That is correct.

Q Number three was Noelia Gonzalez?

A That's correct.

Q Number 13 was struck by the State?

A No, she was not.

Q She is not serving, and I didn't strike

her.

A Oh, there's, I -- I -- I didn't mean for her to be struck.

MR. CONNORS: Judge, neither side struck her but she is not serving so that's one problem we have. Juror Number 13, the State's marked her out and then they said keep it. But the Clerk didn't understand that terminology.

THE COURT: Well, we can take care of that problem.

MR. CONNORS: All right.

Q Your next okay. The next juror that you did strike is Number 14, Juror Ms. Romo?

A That's correct.

Q Your fifth strike was Judith Lawson, Juror 15?

A Yes.

Q Your sixth strike was Ricardo Rene De La Vina, Number 17?

A That's correct.

Q And number 18 is Reynaldo Vega; is that

correct?

A That's correct.

Q And number 19 is Daniel Torres?

A That's correct.

Q You struck him?

A Yes.

Q Number 20, juror 9, your ninth strike is Fidel Alfredo Borrego?

A That's correct.

Q And your tenth strike is Daniel Alfredo Ramirez?

A That's correct.

Q Did you strike anybody for the alternates?

A No I didn't.

Q Will you agree with me that Ms. Lawson has an Anglo sounding last name?

A Yes, I would.

Q And the rest of the strikes are not -- excuse me, the rest of the jurors that you struck all have Hispanic sounding Spanish surnames?

A Yes, sir, I would.

MR. CONNORS: Judge, another problem, neither side struck Ms. Skloss, Juror Number 31, but she's not serving based upon apparently some clerical error of the clerk's office. I'd like to court to correct that also. Neither side struck her, but she is not on the list. We went way past her in picking the jurors. Juror 36 is serving, Juror 40 is serving, judge.

THE COURT: Gentlemen, correct your list right now. Take a black marker, State, and mark through the ones you want and be sure it's correct. Do it right now.

MR. CONNORS: I got a black marker here.

THE COURT: Absolutely no excuse for this type of thing happening. Make sure you strike out the ones you want struck out.

MR. MARTINEZ: I've done that Your Honor.

MR. CONNORS: You're entitled to one more under -- since we're using an alternate, I don't if you want exercise or not.

MR. MARTINEZ: No, no.

MR. CONNORS: All right, judge.

THE COURT: Is your list a correct list? Go through it again. The court is directing its remarks to the defence now. And bear in mind, the record will reflect, that these proceedings are being held in the court's chambers outside the hearing, view, or presence of the entire jury panel, with all attorneys and the defendant present.

MR. CONNORS: I used up 11 strikes Your Honor thinking I had one for the alternate.

THE COURT: Very well.

MR. CONNORS: I've marked them in black.

THE COURT: Bring the jury Clerk in

here.

THE BAILIFF: Yes, sir.

THE COURT: I'm going to ask a favor of my attorneys, both the defense and one of the prosecutors.

MR. MARTINEZ: Yes, Your Honor.

THE COURT: Go with the Jury Clerk, sit with him so there can be no ambiguity.

(Clerk enters the chambers.)

THE COURT: Mr. Clerk you made a mistake on this based upon an error that they had made. They have now struck out the correct or the correct strikes are now shown on there.

THE CLERK: Okay.

THE COURT: One of the states attorneys and the defense attorney will accompany you. Meet with them, do it here or somewhere where you can.

THE CLERK: Okay.

THE COURT: At their convenience, and make up a corrected list.

THE CLERK: Yes, sir.

THE COURT: Twelve jurors and one alternate.

THE CLERK: One alternate.

MR. CONNORS: Yes, judge, that's fine.

THE COURT: All right. Is that satisfactory counsel?

MR. CONNORS: That's satisfactory on that problem.

THE COURT: All right.

MR. CONNORS: My article 35 point whatever that number is.

THE COURT: Very well step outside for a second and let me here the rest of the -- do you need that last for purposes of the --

MR. CONNORS: No.

THE COURT: Okay.

MR. CONNORS: Judge, if I understand the rules, I believe I made a prima facie case with -- with my client being Hispanic surnamed and the state striking that many

Hispanic surnamed jurors that the burden now falls not upon me to go forward but upon the State.

THE COURT: The State has got to prove that they did not strike based upon race alone.

MR. MARTINEZ: Yes, Your Honor. First of all, I would like to state for the record, Luis Martinez, States of Texas, that the vast majority of jurors, veniremen rather, are of Hispanic dissent as we are in Hidalgo County, in deep South Texas.

Second of all the jurors that remained on the the veniremen that remained as jurors are all Hispanic, which are the same race Mexican dissent as the defendant. So by exercising strikes, I -- it's almost a near impossibility not to strike ten hispanics. As far as particular reasons, I -- if I had a list of the actual strikes Your Honor, I could

go person by person.

MR. CONNORS: You'd like to sit down by me and we can both use the same list.

MR. MARTINEZ: Yes.

Q I show juror one was struck by the State Your Honor. Leonardo Munoz?

A I felt that Mr. Munoz had waivered and he was challenged for cause by the defense. I felt that he had waivered in his answers and I felt uncomfortable with that, so therefore I struck him.

Q If I may? Are there any other explanations on that juror?

A On that juror? No, that's -- I -- because he seemed to waiver in his answers to Mr. Connor's questions on -- on the challenge for cause as to his ability to -- to consider the full range of punishment.

Q I show Your Honor that the State struck Juror 11 which is Noelia Gonzalez. Counsel, if you could explain to the court why you struck that young lady?

A Ms. Gonzalez, Jay do we have excuse me Your Honor I need my --

MR. CONNORS: It's in the courtroom.

MR. PALACIOS: Judge, may I be excused to get a list from the courtroom.

THE COURT: Sure.

MR. MARTINEZ: Would you like to go on to someone else?

Q Next one I think is Number 14, Your Honor, Maria Romo?

A Ms. Romo sitting on the --

Q She is the second one, I think in the second row?

A Yeah, second one. I also felt that she tended to -- to waiver when I asked her certain questions at voir dire she seemed to indicate certain answers and when Mr. Connors asked her questions, she seemed to -- to waiver. She -- she seemed -- she seemed unsure of herself and I felt uncomfortable with the -- she seemed unsure of herself also, and I felt -- I

felt that she -- I felt uncomfortable with her also because she seemed -- she seemed to waiver.

Q Is that all on that juror Mr. Martinez?

A That's all.

Q I ask you to go back to Juror 11 that's Noelia Gonzalez?

A Yes. Noelia Gonzalez, she seemed not to understand the principles of law which I needed to rely on. She seemed -- she -- she seemed to me confused as to the principles of law and did not seem to understand them, and I felt uncomfortable with someone that could not understand the principles of law which the state is entitled to rely on. That was my personal observation on it. And I felt uncomfortable with her for that reason. That's all I have on that Your Honor.

Q Juror 17, I believe the State struck, Your Honor, Ricardo Rene De La Vina?

A Yes, Your Honor. I struck Ricardo De La

Vina because he knew many sheriff's officers and is now working for the defense. I was afraid that he might interject his own personal opinions. I was afraid that he might have a prejudice or bias, although he did not state one on the record. I felt that he might -- I felt that his -- his knowing some of the witnesses might effect the way he thought and I felt uncomfortable with that aspect and I felt that he would favor the defense since he is a -- an investigator for a defense lawyer here in the same community in which this case is being tried.

Q Is that all on that juror?

A That's all to that juror.

Q Your Honor, I think the next one is Juror 18 which name is Reynaldo Vega?

A Reynaldo Vega is from the same area in which the -- my understanding was that he's from the same general area in which the shooting took place. I was afraid

that he might have some general information that might effect his his opinion and could not give either the State or the defense a fair trial. I felt he had that he may -- my information was that he lived near the area.

THE COURT: Move along.

Q Counsel, if I can, on cross-examination on that one, I show you the card on Rene Vega, he lives down at 96 -- his phone is 968 which is the east end of the county, I believe, not the west end where this offense occurred?

A Being from Houston and not knowing the area, I did rely on Mr. Palacios' information.

Q All right. That's on that one?

A Let me see there might have been a different reason but I -- I realized.

MR. PALACIOS: That was Fidel Borrego is this one that we talked about.

MR. MARTINEZ: Oh, Fidel Borrego, I'm

sorry that was Juror 20. The reason for Juror 20 was because he was from the general area.

Q You said he was from the general area of the Hargill on your kidnapping case that that might be an extraneous offense of punishment; isn't that correct, but not -- he didn't say anything about, I lived from Sullivan City?

MR. PALACIOS: I believe he spoke that he had a -- that he opened a business in that area.

MR. MARTINEZ: That was Jay Palacios for the record assisting me. He also informed me of that he owned a business in that area, that's correct. And I -- we felt that since he was from the area, he might have special knowledge of it.

MR. CONNORS: If I can clarify which area we have two here. The Davila, Hargill area or the Sullivan City murder area for this case?

MR. PALACIOS: For the record, my understanding was that he was -- had a business in Palmview which is the vicinity of Sullivan City.

MR. CONNORS: Did you rely on that information from Mr. Palacios?

MR. MARTINEZ: Yes, I did. And for that reason we struck that one venireman.

MR. CONNORS: The next -- the next juror I believe is Juror 20, Fidel Borrego. He's from the Edcouch area. Can you tell us why he's different than Reynaldo Vega that we were talking about a minute ago.

MR. PALACIOS: Fidel Borrego is the one we talked about Mr. Connors.

MR. CONNORS: Let me back up. Your Honor apparently we just finished talking about Juror 20, Fidel Borrego, I'd like to ask about Juror 18, Reynaldo Vega. Why did the State strike him Mr. Martinez?

MR. MARTINEZ: Let me see his

information sheet. Well, one of the reasons was that we couldn't understand what his occupation was, we talked about him. We couldn't make that out maintain or T.R. it just basically to me I couldn't get very much information from him and he seemed to be someone I couldn't make much out of, as far as, I don't believe he -- he answered too many questions and I -- I just felt uncomfortable with him generally, is that I didn't -- I couldn't even tell what he was doing for a living so I --

MR. CONNORS: During your voir dire, did you ever inquire of him what he was doing for a living?

MR. MARTINEZ: No, I read that on the -- on the sheet, on the juror information card.

MR. CONNORS: Are there any other reasons?

MR. MARTINEZ: At this time, none come

to my mind.

MR. CONNORS: Juror 22, I believe, is next Your Honor.

MR. MARTINEZ: Daniel Ramirez, I believe he was -- I believe he was the -- the janitor at P.S.J.A.

MR. CONNORS: That's correct, red skin.

MR. MARTINEZ: Yes, and red hair. It was just a few months ago that I assisted in trying a murder case which a janitor from P.S.J.A. was convicted of murder and sentenced to life. I had questioned many janitors, he may not have remembered me. I don't think I remember him, but I was afraid that the chance an off-chance that we had met or we had discussed the other murder case which I was prosecuting a fellow janitor, I felt rather than run a risk, I didn't want him on that jury, and for that reason I -- I struck the janitor Mr. Daniel Ramirez.

MR. CONNORS: Are -- were there any other reasons?

MR. MARTINEZ: Basically, that was it. We had 15 minutes to -- to impose our strikes and that's --

MR. CONNORS: That's all of this witness, Your Honor. I'd like to brief.

MR. MARTINEZ: Mr. Connors, I'm not sure did I strike Number 15, Judith Lawson?

MR. CONNORS: Yes, but she is of a different race than my client so --

MR. MARTINEZ: Even though she had the last name Lawson I thought she might be hispanic also judging from her -- for the record --

MR. CONNORS: What reasons do you have for striking here?

MR. MARTINEZ: I struck her because she seemed to have spent a lot of time in Panama and perhaps wouldn't be as -- as -- have a full understanding of our judicial

process and I felt that she -- she might not completely understand the principles that we were discussing and I did question her and it just seemed to me that she didn't quite grasp what I was trying to get across to her at voir dire. Therefore I felt uncomfortable with her.

MR. CONNORS: Judge, I'll pass this witness.

THE COURT: Very well. Any other witnesses?

MR. CONNORS: I'd a like to call Mr. Palacios briefly.

THE COURT: Well, let me ask Mr. Martinez a question. Mr. Martinez, you're still under oath, sir.

MR. MARTINEZ: Yes, sir.

THE COURT: Did the issue of the race of these jurors that you struck ever enter into your deliberations?

MR. MARTINEZ: Not at all Your Honor, most of them are Hispanic or Mexican

dissent.

THE COURT: And have you counted the number of jurors that we had?

MR. MARTINEZ: Yes, Your Honor, we have 40.

THE COURT: Of those 40, how many had identifiable Spanish surnames.

MR. MARTINEZ: I would say --

THE COURT: Count them, don't guess.

MR. MARTINEZ: Okay, sir. 32, Your Honor out of the 40 had identifiably hispanic --

THE COURT: Count again, see if there's 34.

MR. MARTINEZ: Well there was two that didn't have -- like Mrs. Vair I would consider that not identifiably hispanic but she was Hispanic.

MR. CONNORS: I agree that she was Hispanic Your Honor.

MR. MARTINEZ: And Mrs. Lawson who, although, doesn't have an identifiably

hispanic last name was hispanic and that would make a total of 34 hispanic, 32 which have identifiably his last names with a total of 34 out of 40 Hispanic. Even if I would have used -- if I would have used all my strikes, I didn't strike either for race, because of Hispanic dissent or Mexican dissent or none Hispanic dissent. It was based only --

THE COURT: Race had nothing to do with your decision to strike.

MR. MARTINEZ: Not at all, Your Honor.

THE COURT: Very well. Mr. Palacios raise your right hand.

(Witness sworn.)

JAY PALACIOS,

a witness called, after having first been duly sworn upon his oath to tell the truth, the whole truth and nothing but the truth, testified upon his oath as follows,

to wit:

EXAMINATION

BY MR. CONNORS:

Q If I may? As to each of the jurors we went over with Mr. Martinez here on the record a few moments ago during his testimony, can you add any other reasons why the State struck any of those people? We'll start with Juror 1 the State struck Mr. Munoz? If you have the same reasons as Mr. Martinez we're not asking?

A They're the same reasons.

Q Anything new? All right. Now the next juror that I noticed Juror 11 Noelia Gonzalez. Any other reasons?

A No other reasons.

Q Juror 14, Maria Romo, r-o-m-o, any other reasons?

A No other reasons.

Q Juror, Ms. Lawson, juror 15, any other reasons?

A No other reasons.

Q Juror 18, Reynaldo Vega, any other reasons?

A No other reasons.

Q Fidel Alfredo Borrego, Number 20, any other reasons?

A No other reasons.

Q Juror Number 22, Daniel Ramirez, any other reasons?

A No other reasons.

MR. CONNORS: I believe that's all, judge. Does the court have any questions? I will pass the witness.

THE COURT: Mr. Palacios, the court will ask you the same question. You're under oath. Did the issue of the race of any of these jurors that you struck enter into your decision to strike said jurors?

MR. PALACIOS: No race was an issue when we were discussing strikes. Mr. Martinez and myself.

THE COURT: Very well. Counselor, I have allowed you to get this far. The

court is finding, of course, that you established that the defendant is a member of an identifiable race group, the said being of the Hispanic or Mexican American, whatever you desire to call it. That has been established.

The court allowed you to ask questions of the prosecuting team as to the reasons for their striking the jurors and are you satisfied with the leeway allowed you?

MR. CONNORS: Yes, I'm complete Your Honor, my presentation.

THE COURT: And do you have any -- feel free to present, if you have any evidence whatsoever that race entered into the deliberations or into the decision to strike any of these people.

MR. CONNORS: Other than it's seems a couple of the answers counsel has given here doesn't seem credible based on the jury regard we had over the jurors

watching us and we watching the jurors, Your Honor.

THE COURT: What does not seem credible counselor?

MR. CONNORS: Especially on Jurors 18 and 20 Your Honor. Fidel Borrego --

THE COURT: Do you -- do you have any evidence --

MR. CONNORS: If they --

THE COURT: That I can see, look or hear that these prosecutors struck anyone of these jurors because of racial characteristics or origins?

MR. CONNORS: All I can say is if when asked what's the reason for it and they give you an incredible answer you're supposed to present this for race, as I understand the law Your Honor. And as to 18 -- Juror 18 and 20 their answers are incredible.

THE COURT: Well, 35.261 says, the Court shall grant -- the defendant may

request the court to dismiss the array and call a new array in the case. Which you did. There's no problem there. I have got no quarrel with you there. The court shall grant the motion of a defendant more dismissal if the court determines that the defendant is a member of an identifiable racial group which I've done. However, there's a comma, that the attorney I have got to be satisfied that the attorney representing the state exercised preemptory challenges for the purpose of excluding persons from the jury, or the basis of their race, comma, and that defendant has offered evidence of relevant facts to show that the challenges were made by the attorneys representing the state were made for reasons based on race.

So it's a three prong test as I see it. The last prong being that the defendant has offered evidence of relevant facts to show that these gentlemen struck

the jurors based on race. My offer to you counselor is if you have any such relevant facts, please make them known to me.

MR. CONNORS: Based on the entire voir dire done yesterday and today, Your Honor, I believe the record shows that Fidel P rego said that he knew Juan Davila, the f er of the Davila people from -- from Hargill, his dad used to own a store in that area where this young man went to when he was a young man. That's the same dad that I mentioned in voir dire was sentenced to 50 years or assessed 50 years in a murder case recently and now he's out on the lamb, and the sheriff hasn't arrested him yet.

So for the State to turn around and tell us he owns property in Palmview and he's from the Sullivan City area and he -- he would know these people in the area of the murder, that Hargill is nowhere near Sullivan City. I think the court -- the

record's real clear on that. The other man they tried to use that same excuse for was Reynaldo Vega who lives down at 968 home phone number which is nowhere in the Sullivan City area. And -- and may be they got him confused, but they don't have a credible answer as to at least one of those two jurors.

THE COURT: Anything else counselor?

MR. CONNORS: The Batson case and the way it's been construed says when this racial area the equal protection clause and due process clause of the Fourteenth Amendment say that you're to presume race if the State doesn't give you a credible answer Your Honor. I rely on those federal decisions as construed by the Court of Criminal Appeals in this area and the Constitution -- Federal Constitution.

THE COURT: Well, the court can only state for the record that we live in Hidalgo County. This is a very close nit

community stretching from roughly borders of the Rio Grande Valley, from Port Isabel to Sullivan City, I would guess. And we're not in a real huge, large metropolitan area such as Houston, Dallas Fort Worth, Chicago, Washington or St. Louis or anything of those places, Miami. I did not make a specific and exact count, but I have reason to believe that there were 40 jurors on there, some were challenged for cause by the defense. These were granted by the court and of the -- of that original 40 group without the challenges for cause, I believe there were 34 that had identifiable Spanish surnames and the remaining six had none Spanish surnames. But nonetheless we just don't know whether Hispanic or not that happens sometimes here, somebody named Davis may actually be Hispanic. I'm not overly concerned with that other than the fact that the large majority of jurors left to

select this jury from were largely Hispanic in nature.

The court finds and I am so finding, one, that the defendant, of course, is from an identifiable racial group. I do not find, and I will not find that State has caused error, created error in any type abused discretion of any nature whatsoever in exercising the strike that they did strike.

And I find based upon the evidence which I have heard before me, that there is no probable cause or sufficient reason established to dismiss the array counselor. So, your motion is denied. As soon as the correct list comes in --

MR. CONNORS: We will go up there right now.

THE COURT: As I requested both of you fellows go out with the.

MR. MARTINEZ: Yes, Your Honor.

THE COURT: Yes, sir, thank you. You

may retire. Let me know as soon as you get ready out there.

MR. CONNORS: Thank you, judge.

(End of chambers hearing.)

(Recess taken.)

(WHEREUPON, the following was had back in open court in front of the general jury panel.)

THE COURT: You may be seated. The jury strikes have been made Mr. Palacios, Mr. Martinez and Mr. Connors?

MR. CONNORS: Yes, judge.

THE COURT: And any objections to the manner in which it was done in?

MR. CONNORS: None, other than already noted on the record and we've all seen this list that the clerk is ready to read and we accept that list, Your Honor.

THE COURT: Very well. Ladies and gentlemen of the jury panel, as your names are called, please rise and take your

place on the jury box.

THE CLERK: Jose Luis Rendon, Juan Manuel Hernandez, Beatrice M. Valdez, Idelia Norma Gonzalez, Ana Lisa Martinez --

THE JUROR: It's Ramirez.

THE CLERK: It's Ramirez? Okay. Ruben Gonzalez, Hermelinda Aguirre, Gloria M. Gonzalez, Pablo Valle, Jesus Rangel, Carol Skloss, Manuel Chapa and Arthur M. Mulkey.

THE COURT: Did you name the alternate?

THE CLERK: Yes.

MR. MARTINEZ: That's correct, Your Honor.

THE COURT: Do we need the rest of the panel?

THE CLERK: Dismiss.

THE COURT: Ladies and gentlemen of the jury panel remaining, I've just been informed that your services are now over.

You may go home. You won't be needed. So thank you very much for having served with us.

(General panel dismissed.)

THE COURT: Mr. Connors, I noticed you were rising. Do you have a motion or do you wish to address the court?

MR. CONNORS: I'm not sure what to do. I think Juror 5 is married and has a new last name. I wonder if you could get her last name correct. It's not Martinez, I think it's Ramirez, but I may be wrong.

THE COURT: Ana Lisa Martinez.

THE JUROR: It's Ramirez.

THE COURT: Please rise. What is your correct name, ma'am?

PROSPECTIVE JUROR: Ramirez, Ana Lisa Ramirez.

THE COURT: Where did Martinez come from?

THE JUROR: Excuse me? I never changed it. I went ahead and changed it

for my driver's license but as for my voting, no I never changed it.

THE COURT: What was your number before we --

THE JUROR: Excuse me, sir?

THE COURT: What was your number out there?

THE JUROR: I'm not certain.

MR. CONNORS: Judge, if I may, it's 12.

THE COURT: Number 12.

MR. CONNORS: Or at least that's the way it's listed on the card.

THE COURT: It's listed Ramirez. I don't know how they got Martinez. Do I hear a defense motion to change -- to correct the name --

MR. CONNORS: Yes, judge.

THE COURT: -- to Ramirez?

MR. CONNORS: Yes, judge.

THE COURT: By the court's --

MR. CONNORS: Yes, judge.

THE COURT: -- interlineation. No objection?

MR. MARTINEZ: No objection, Your Honor.

MR. CONNORS: None, judge.

THE COURT: Very well. Ana Liza --

THE JUROR: L-i-z-a.

THE COURT: -- Ramirez, very well.

THE JUROR: Yes, sir.

THE COURT: Let me -- very well, thank you, ma'am. You may be seated. Anything else Mr. Connors?

MR. CONNORS: No, judge.

THE COURT: Very well. Ladies and gentlemen of the jury, please rise and raise your right hand.

(Jury panel sworn by the Court.)

(WHEREUPON, the proceedings were concluded.)

THE STATE OF TEXAS §

COUNTY OF HIDALGO §

I, JESSIE C. SALAZAR, Official Court Reporter in and for the 92nd Judicial District Court, Hidalgo County, State of Texas, do hereby certify that the above and foregoing contains a true and correct rough transcription of all the proceedings had in the above-styled and numbered cause, all of which occurred in open Court or in chambers and were reported by me.

I further certify that the transcription of this Statement of Facts truly and correctly reflects the exhibits, if any, offered by the respective parties.

I further certify that the cost of the foregoing Statement of Facts is $698.00 and is due and owing.

WITNESS MY HAND this the 7th day of June A.D., 1993.

/s/ Jessie C. Salazar
JESSIE C. SALAZAR, CSR-RPR
Official Court Reporter
92nd Judicial District
Hidalgo County Courthouse
(210) 318-2262

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